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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW DOUGLAS BURNETT,

Defendant and Appellant.

H034068

(Santa Clara County  
Super. Ct. No. CC199997)

Defendant appeals from the denial of his motion to seal and destroy arrest records and petition for a finding of factual innocence. (Pen. Code, § 851.8.)<sup>1</sup> We appointed counsel to represent defendant in this court. Appointed counsel has filed an opening brief which states the case and the facts but raises no specific issues. We informed defendant of his right to submit written argument in his own behalf within 30 days and he has submitted a supplemental opening brief arguing that section 851.8 violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, and Article 1, section 7(a) of the California Constitution.

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), we have reviewed the entire record and defendant's brief, and we have concluded that there is no arguable issue

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Penal Code.

on appeal. (See also *People v. Kelly* (2006) 40 Cal.4th 106, 124.) Therefore, we will affirm.

### **PROCEDURAL BACKGROUND**

On February 9, 2001, defendant was charged with possession of a deadly weapon while lawfully confined in a jail. (§ 4574, subd. (a.) ) On March 6, 2001, following a preliminary hearing, defendant was held to answer. On May 15, 2001, the charge was dismissed “due to insufficiency of the evidence.” On March 24, 2003, defendant brought a motion *in propria persona* to seal and destroy the record of his arrest for this offense, pursuant to section 851.8, subdivisions (b), (c) and (d). The People opposed the motion. On April 25, 2003, the Honorable Marc Poché heard argument and denied the motion on the merits.

On February 3, 2009, defendant brought a second motion *in propria persona* to seal and destroy the record of his 2001 arrest. The People again opposed the motion. At the hearing on the motion, the court asked defendant: “So then is there any authority for bringing the motion again before this court?” Defendant responded: “Yes, Your Honor. [¶] . . . [¶] I’m looking to have the statute declared unconstitutional. And the support for that is that our foundation of our legal system is based on the presumed innocence until proven guilty. [¶] The State of California, which is one of the few States who has chosen to separate factual innocence from innocence, found in front of a trial, and I believe it’s prejudiced me, where this material was based on substandard evidence, and evidence that was either not present or destroyed, would not have even held up in any trial in this country. [¶] And the county refuses to seal or destroy this record of arrest, which is very prejudicial, because it’s involving a supposed weapon in custody, and is looking just to make my life more difficult, when there is no evidence to support any findings along the way. [¶] And I understand this motion has been brought before. I just feel that this statute is unconstitutional and, in particular, denies me the rights that I’m

eligible for outside the State of California and in the State of Georgia. And I feel that's a violation of federal law and California State law." The court denied the renewed motion.

### **STATEMENT OF FACTS**

The following facts are derived from the preliminary hearing transcript.

Correctional Officer Timothy Allen Davis testified that on January 30, 2001, he was assigned to search some cells at the Main Jail South in San Jose. Specifically, he was assigned to search defendant's property. While searching defendant's belongings he found a "shank" made out of the sharpened handle of a comb. The handle of the "shank" was made out of some clothing string such as the elastic threads from underwear or socks. A Xerox of a photograph of the weapon was marked for identification and admitted into evidence. Officer Davis found the weapon "underneath the bunk wedged between a support bar underneath [defendant's] bunk." He knew that bunk belonged to defendant because inmates either choose a bunk or are assigned a bunk, and space is provided for a box or bags for the inmate's personal items with the inmate's name on it.

The cell is a dorm type cell with a wall partially dividing it. There are approximately 22 bunks in this cell. There were at least 10 people in addition to defendant being housed in that cell on January 30. The bunks are not secured, and anyone in the cell can have access to them.

### **DISCUSSION**

On August 18, 2009, appointed counsel filed a *Wende* brief in this court. On September 18, 2009, defendant filed a supplemental brief in his own behalf in this court. In it, defendant argues that the section 851.8 violates equal protection because "government has affected two similar groups (non-convicted persons) in an unequal manner (those with a record of arrest and those without). Those persons with a record of

arrest have a criminal stigma attached whereas, those persons who do not have a record of arrest do not suffer from this debilitating label.”

Section 851.8 allows a person to petition the superior court for a finding of factual innocence in the following situations: “where a person has been arrested and no accusatory pleading has been filed” (§ 851.8, subds. (a)); “where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred” (§ 851.8, subd. (c)); and “[w]hensoever any person is acquitted of a charge” (§ 851.8, subd. (e)). “ ‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ ” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199; *People v. McCann* (2006) 141 Cal.App.4th 347, 352-353.) Defendant has not demonstrated that persons with and without arrest records are similarly situated with respect to section 851.8. Moreover, he has not demonstrated any reason why the trial court should have revisited his claim of factual innocence which had been denied on the merits in 2003. No error appears.

Pursuant to *People v. Wende, supra*, 25 Cal.3d 436, we have reviewed the entire record. We conclude that there is no arguable issue on appeal. (*People v. Kelly, supra*, 40 Cal.4th at p. 124.)

## DISPOSITION

The judgment is affirmed.

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McAdams, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Duffy, J.